

K and D Painting, Inc., and JAR Painting and Dale Bowman. Case 8-CA-26330

April 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

Upon a charge filed by Dale Bowman, an individual, on April 26, 1994, the General Counsel of the National Labor Relations Board issued a complaint on September 30, 1994, against K and D Painting, Inc., and JAR Painting, the Respondents, alleging that they have violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondents failed to file an answer.¹

On January 17, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On January 20, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated October 17, 1994, notified the Respondent JAR that unless an answer was received by November 4, 1994, a Motion for Summary Judgment would be filed.

The letter dated October 11, 1994, from K and D's attorney stating that Respondent K and D was allowing a default on the complaint because it is essentially an assetless company does not constitute a proper answer to the complaint because the letter does not address the facts alleged in the complaint. Furthermore, even if the letter constituted a proper answer, the Respondent has not raised any issues warranting a hearing.

¹ The attorney for Respondent K and D Painting did respond by letter dated October 11, 1994, that he had been instructed by the president of K and D Painting to allow a default on the complaint as K and D Painting "is essentially an asset-less company whose only assets are some accounts receivable already subject to a paramount IRS tax lien."

In the absence of good cause being shown for the failure to file a proper and timely answer, and in the absence of any material issues warranting a hearing, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, K and D Painting Inc., is an Ohio corporation, with a facility in Toledo, Ohio, where it annually performs services in excess of \$50,000 in Ohio and in States other than the State of Ohio for entities which are in commerce on a direct basis. We find that the Respondent K and D Painting, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent JAR Painting, a sole proprietorship, has been owned by John Kouhn, and doing business as JAR Painting. Annually, JAR Painting, in the course and conduct of its commercial painting business, has received \$50,000 for services performed for entities engaged in commerce on a direct basis. We find that the Respondent JAR Painting is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, K and D Painting, Inc. and JAR Painting have been joint employers of the employees of JAR Painting. K and D Painting, Inc. has an ownership interest in and has possessed control over the labor relations policy of JAR Painting. Sometime after January 31, 1994, JAR Painting was established by Respondent K and D Painting, Inc. as a disguised continuance of Respondent K and D Painting, Inc. Respondent JAR Painting and Respondent K and D Painting, Inc. are alter egos and a single employer within the meaning of the Act.

International Brotherhood of Painters and Allied Trades, Local 406, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent K and D Painting, Inc. and Respondent JAR Painting have been parties to a contract which provides that K and D Painting and/or JAR Painting, as the agent for K and D Painting, Inc., perform services in connection with a contract for painting services for Central Ohio Building Company, Inc. at its Marion, Ohio jobsite.

Since about February 9, 1994, Supervisor Mark Reinsel,² at the Marion, Ohio jobsite, threatened employees that if the Union's business agent were to visit

² Reinsel is a supervisor of the Respondents within the meaning of Sec. 2(11) of the Act and is an agent of Respondents within the meaning of Sec. 2(13) of the Act.

the Marion jobsite the employee responsible would be assaulted, killed, and/or suffer other unspecified reprisals. By this conduct Respondents interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

About February 10, 1994, Respondents permanently laid off and failed to reemploy their employee Dale Bowman, the Union's jobsite steward, because of Bowman's membership in and activities in support of the Union. By this conduct Respondents have discriminated against Bowman in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By threatening employees that if the Union's business agent were to visit the Marion jobsite the employee responsible would be assaulted, killed, and/or suffer other unspecified reprisals, the Respondents have threatened employees, and have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By, on about February 10, 1994, permanently laying off and failing to reemploy their employee Dale Bowman, the Union's jobsite steward, because of Bowman's membership in and activities in support of the Union, the Respondents engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(1) and (3) by permanently laying off and failing to reemploy Dale Bowman, we shall order the Respondents to offer the discriminatee immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful permanent layoff and failure to reemploy, and to notify the discriminatee in writing that this has been done.

ORDER

The National Labor Relations Board orders that Respondent K and D Painting, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, and that Respondent John Kouhn, a sole proprietorship, doing business as JAR Painting, Toledo, Ohio, his agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently laying off and failing to reemploy or otherwise discriminating against any employee for membership in and support of the International Brotherhood of Painters and Allied Trades, Local 406, AFL-CIO or any other union.

(b) Threatening employees because of their union support or activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dale Bowman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from their files any reference to the unlawful permanent layoff and failure to reemploy and notify Dale Bowman in writing that this has been done and that the permanent layoff and failure to reemploy will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at their facility in Toledo, Ohio, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT permanently lay off and fail to reemploy or otherwise discriminate against any of you for

supporting the International Brotherhood of Painters and Allied Trades, Local 406, AFL-CIO or any other union.

WE WILL NOT threaten you because of your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dale Bowman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his permanent layoff and our failure to reemploy him, less any net interim earnings, plus interest.

WE WILL notify Dale Bowman that we have removed from our files any reference to his permanent layoff and our failure to reemploy him and that the permanent layoff and our failure to reemploy him will not be used against him in any way.

K AND D PAINTING, INC., AND JAR
PAINTING